IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 777 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ISHABHAI MUSABHAI
Versus
RASULBHAI NOORABHAI

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Appearance :
MR NK MAJMUDAR for the Petitioner
MR JK THURIA with MR GHANSHYAM THURIA for the Respondent

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 25/01/2006

ORAL JUDGMENT

1. Petitioner – original plaintiff in Regular Civil Suit No.118 of 1984 filed in the Court of learned Civil Judge (J.D.), Botad is before this Court being aggrieved of an order passed by the learned Civil Judge (J.D.), Botad in Misc.Civil Application No.3 of 1995, which was

filed by the present respondent – original defendant No.1. The learned Judge was pleased to grant the application filed under Order 9, Rule 13, Civil Procedure Code and quash order dated 31.03.1986 decreeing the suit. The learned Judge restored Regular Civil Suit No.118 of 1984 on the file and ordered that the same be heard after giving permission to the applicant – present opponent – original defendant to lead his evidence. The parties were directed to bear their own costs.

2. The facts leading to the present litigation are that the petitioner – original plaintiff filed the aforesaid suit for declaration and injunction against the present respondent – original defendant No.1 as well as against defendant No.2 – Bai Rajiben Noorabhai – the mother of the present respondent. It was the case of the plaintiff that the property of the petitioner is situated at Botad – Gadhda road and that the respondent has no right to put up construction on southern side of the property of the petitioner resulting into the closure of the 'right of way' of the petitioner – plaintiff. The plaintiff had prayed for permanent injunction that the defendants be restrained from putting up the construction on the southern side of the property of the petitioner; that the defendants be restrained from obstructing the door

abutting on the open land which was used by the plaintiff as 'right of way'. The plaintiff had also prayed that the defendants be restrained from creating any nuisance, obstruction by putting up any construction.

The defendants appeared and filed the written statement at Exh.14. Subsequently, the advocate appearing on behalf of the defendants filed a pursis (Exh.47) on 17.12.1985 in presence of the defendant, praying that he be allowed to retire from the matter. The permission was granted by the Court on the same day, i.e. on 17.12.1985. the Court was pleased to adjourn the matter to 20.12.1985 and directed the defendant to remain present with his advocate on that day. It is the case of the plaintiff – petitioner that the present respondent – defendant had made an endorsement on the said pursis (Exh.47) and 'permission to retire' was granted in his presence; that the respondent – original defendant had stated on the said application that, 'he is made to understand that his advocate has retired and the matter is adjourned to next date, i.e. 20.12.1985 and that he was required to remain present with his advocate on 20.12.1985 for further hearing of the suit.'

3. Thereafter, the respondent – original defendant did

not remain present and the Court having found no other alternative, decreed the suit on 31.03.1986. Against that the respondent – original defendant filed an application Exh.51 which came to be numbered as Misc.Civil Application No.3 of 1995 which is allowed by order dated 12.03.1998. That order is under challenge.

4. It was after lapse of more than 9 years of passing of the decree in the aforesaid suit (Regular Civil Suit No.118 of 1984) that the application was filed under Order 9, Rule 13 of Civil Procedure Code and that application is allowed by the learned Judge exercising the jurisdiction which the learned Judge did not have resulting into a manifest injustice.

5. The learned advocate appearing for the petitioner invited the attention of the Court to the reasons, particularly paragraph No.5 of the order under challenge. The learned advocate also invited the attention of the Court to the deposition of respondent – original defendant No.1 – Rasoolbhai Noorabhai – Exh.22, a copy of which is produced on the record of this Civil Revision Application. The relevant part of the cross-examination reads as under:

> “It is true that in a suit filed by Isha Musha, the day on which my advocate retired, I was present in the Court. It is true that he had retired in my presence. It is true that thereafter, the Court had intimated me that my advocate has retired and as a token thereof, my signature was taken. It is not true that on that day, I was intimated that I have to remain present on 20.12.1985 after engaging an advocate; that thereafter, I have not gone to the Court; that thereafter, I have not met my advocate; that I have not inquired from the advocate as to what is the result of the suit or I have not inquired from the Court.....”

Despite this clearcut admission on the part of the respondent – original defendant, the learned Judge has assumed the jurisdiction in the matter and without there being any application for condonation of delay, the learned Judge has erroneously shifted the burden of proof, about the knowledge of the decree being passed in Regular Civil Suit No.118 of 1994. The learned Judge has observed that, “the applicant (of Misc.Civil Application No.3 of 1995) has come with the case that it was only when the decree passed in Regular Civil Suit No.118 of 1994 was produced in Civil Suit No.15 of 1995 that he came to know about the same.....”. The learned Judge has then proceeded to observe that, “as against this, it is the case of the opponent (of Misc.Civil Application No.3

of 1995) that the applicant knew about the decree in the year 1986 itself.....”. The learned Judge has also taken into consideration that the present Misc.Civil Application is not filed along with any application for condonation of delay. He accepts the statement made in the application, that this application (Misc.Civil Application No.3 of 1995) is filed within 30 days from the date of the knowledge about the decree passed in Regular Civil Suit No.118 of 1984.

6. Mr.Thuria, the learned advocate, who appears for the respondent, replacing the earlier advocate Mr.Minesh C.Dave submitted that a Civil Revision Application under Section 115 of the Code of Civil Procedure has a vary narrow scope. He cited following judgments of the Hon'ble the Apex Court to bring home the aforesaid submissions made by him:

1. **SHER SINGH (DEAD) THROUGH LRs VS. JOINT DIRECTOR OF CONSOLIDATION AND OTHERES**, reported in AIR 1978 SC 1341.
2. **DAVINDERPAL SEHGAL AND ANOTHER VS. PRATAP STEEL ROLLING MILLS PVT LTD.**, reported in (2002) 3 SCC 156.
3. **PRAVEEN KUMAR AND OTHERS VS. SURESH CHAND AND**

OTHERS, reported in (2000) 8 SCC 491.

4. **MANIC CHANDRA NANDY VS. DEBDAS NANDY AND OTHERS**, reported in (1986) 1 SCC 512.

The learned advocate relied upon these judgments to convince this Court that present is the case where no interference is called for at the hands of this Court as the learned Judge has not committed any error of jurisdiction. He submitted that even if a point is decided wrongly, this Court should not interfere in the decision of the Court below unless it amounts to either non-exercise of jurisdiction or exercise of the jurisdiction which is not vested in the learned Judge. However, the learned advocate could not convince this Court as to why this case will not fall into category in which the High Court is duty bound to exercise its discretion.

7. In the considered opinion of this Court, this is a case wherein the findings arrived at by the subordinate Court are not borne out by the evidence on the record and that it is manifestly contrary to evidence and palpably wrong and if allowed to stand, would result into grave injustice to a party.

8. Respondent herein seems to be in habit of changing the advocate at his convenience. He had changed an advocate at the trial Court and so before this Court. The reasons are not placed on record and therefore, this Court need not go into the reason for which the party indulges in a practice of changing an advocate in midst of the proceedings.

9. One thing is clear that the learned Judge has committed an error in appreciating the evidence of the respondent – original defendant No.1 – Rasoolbhai Noorabhai – Exh.22 and also evidence of Ishabhai Mushabhai – Exh.36 and has recorded a finding which, if allowed to stand, will result into grave injustice to the party. This Court having perused the evidence on the record of the case, is of the opinion that the findings recorded by the learned Judge are manifestly contrary to the evidence and are palpably wrong and therefore, this Civil Revision Application is allowed. Order dated 12.03.1998 is hereby quashed and set aside. The decree passed in Regular Civil Suit No.118 of 1984 dated 31.03.1986 is upheld. Rule is made absolute with no order as to costs.

(RAVI R.TRIPATHI, J.)

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